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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MAX MILTON,)
)
)
Defendant.)
_____)

CASE NO.: 2:09-cr-00468-PMP-PAL

**REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANT'S AMENDED
MOTION TO SUPPRESS STATEMENTS**

COMES NOW Defendant, MAX MILTON, by and through his attorney of record,
MICHAEL D. PARIENTE, and submits this Reply to Government's Opposition to Defendant's
Amended Motion to Suppress Statements.

This reply is made and based on all the pleadings and papers filed herein and any
argument adduced at the time of hearing.

DATED this 31st day of December 2009.

Respectfully submitted:

MICHAEL D. PARIENTE

/s/ Michael D. Pariente

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Attorney for Defendant

**DEFENDANT'S REPLY BRIEF TO GOVERNMENT'S OPPOSITION TO AMENDED
MOTION TO SUPPRESS STATEMENTS**

I. The Government misstates the Ninth Circuit's holding in Perez-Lopez.

On December 12, 2009, Mr. Milton filed his Amended Motion to Suppress Statements.

On December 28, 2009, the Government filed its brief in opposition to Mr. Milton's Motion.

In its brief, the Government mischaracterizes the holding of the U.S. Ninth Circuit Court of

Appeals decision in United States v. Perez-Lopez, 348 F.3d 839 (9th Cir. 2003). The

Government cites United States v. Perez-Lopez, 348 F.3d at 849 and claims it supports their
position:

Importantly, the Ninth Circuit has held that *Miranda* has "four core requirements." *United States v Perez-Lopez*, 348 F.3d 839, 849 (9th Cir. 2003). Those requirements are that "the defendant understands that he or she need not speak to the police, that any statement made may be used against him or her, that he or she has a right to an attorney, and that an attorney *will* be appointed if he or she cannot afford one." *Id.*, at 848-49 (emphasis in case). Detective Nichols clearly complied with all four core requirements of *Miranda* and, thus, under Ninth Circuit law, his *Miranda* warnings were sufficient."

Government's Response, Page 6, Lines 9-15.

This is incorrect and completely misstates the Ninth Circuit's holding. In United States v Perez-Lopez, 348 F.3d at 849, a case that was decided in Defendant Perez-Lopez's favor, the actual wording of Perez-Lopez 348 F.3d at 849 is as follows:

1 The Tenth Circuit cases relied on by the district court for its contrary conclusion actually
 2 support our holding. The law of that circuit is that "[a] translation of a suspect's *Miranda*
 3 [****24**] rights need not be perfect if the defendant understands that he or she need not
 4 speak to the police, that [***849**] any statement made may be used against him or her, that
 5 he or she has a right to an attorney, and that an attorney will be appointed if he or she
 6 cannot afford one." United States v. Hernandez, 93 F.3d 1493, 1502 (10th Cir. 1996).
 7 (citing United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990)) (emphasis
 8 added).

9 The holding of Perez-Lopez above is not what the Government wishes it was. The
 10 Government argues that the law of the Tenth Circuit is the law of the Ninth Circuit. The Ninth
 11 Circuit made no such ruling. In fact, the Ninth Circuit ruled in Perez-Lopez the following:

12 *Miranda* itself stated that admissibility of any statement given during custodial
 13 interrogation of a suspect depends on whether the police provided the suspect with four
 14 warnings: "the right to remain silent, that anything he says can be used against him in a
 15 court of law, that he has the right to the *presence* of an attorney, and that if he cannot
 16 afford an attorney one will be appointed for him prior to any questioning if he so
 17 desires." *Miranda*, 384 U.S. at 479 (emphasis added); see also *Dickerson*, 530 U.S. at
 18 435. United States v. Perez-Lopez, 348 F.3d 839 (9th Cir. Or. 2003).

19 **II. Merely telling a defendant that he may speak to an attorney is not the same as**
 20 **telling a defendant he has the right to the presence of an attorney before and**
 21 **during questioning.**

22 The Government incorrectly states that Detective Nichols told Mr. Milton "that he had
 23 the right to an attorney". Government's Response, Page 5, Line 12. What Detective Nichols
 24 actually told Mr. Milton was that "he had the right to *speak* to an attorney." Sadly for the
 25 Government, the Ninth Circuit Court of Appeals joined the conservative Fifth Circuit Court of
 26 Appeals and decided against the Government by holding:

27 [The Fifth Circuit] explicitly concludes that "merely telling [a defendant] that he could
 28 speak with an attorney . . . before he said anything at all is not the same as informing him
 that he is entitled to the presence of an attorney during interrogation and that one will be
 appointed if he cannot afford one." Windsor v. United States, 389 F.2d 530, 533 (5th
 Cir. 1968) (emphasis added). Thus, the Fifth Circuit finds advisement of the right to

1 counsel during questioning to be a vital part of the Miranda protections. Although the
 2 question is a close one, we prefer the Fifth Circuit's approach to this issue.
United States v. Noti, 731 F.2d 610, 615 (9th Cir. Cal. 1984)."

3 **III. Noti is the law and was reaffirmed by the Ninth Circuit in United States v. Bland,**
 4 **908 F.2d 471, 474 (9th Cir. Cal. 1990).**

5 The Government cannot seem to accept the fact the Ninth Circuit's holding in Noti is the
 6 law and controls. The Government then attempts to ignore the holding in Noti by stating that it
 7 is "inapposite" because the U.S. Supreme Court's decision in Duckworth v. Eagan, 492 U.S.
 8 195 (1989) was decided later than Noti. To support its flawed argument, the Government cites a
 9 Maryland State Court of Appeals case as support for its contention. Unfortunately for the
 10 Government, the Ninth Circuit Court of Appeals reaffirmed Noti in Bland which was decided
 11 *after* the Duckworth v. Eagan decision:

12 In Noti, we took the view that 'there are substantial practical reasons for requiring that
 13 defendants be advised of their right to counsel *during* as well as *before* questioning.' Id.
 14 at 615. *We will not retreat from Noti here.* United States v. Bland, 908 F.2d 471, 474
 15 (9th Cir. Cal. 1990). (emphasis italicized).

16 As Mr. Milton pointed out in his original Amended Motion to Suppress, he, unlike the
 17 defendants in Prysock or Eagan, was never advised that he had the right to consult with counsel
 18 *before questioning and have counsel present during questioning*. None of the words used by
 19 Detective Nichols conveyed this *Miranda* right to him. Instead, Mr. Milton's case falls under the
 20 rule that where the police have failed to convey to a defendant that he has the right to have an
 21 attorney present before, during and after questioning, he is entitled to suppression of his statements.

22 **IV. Conclusion**

23 Detective Nichols never told Mr. Milton he had the right to the presence of an attorney
 24 before and during questioning. Detective Nichols failed to read his pre-printed, standard issue
 25 *Miranda* warnings card to Mr. Milton, and instead chose to attempt to recite it by memory, which he
 26

1 got wrong. This sloppiness on the part of Detective Nichols in conveying this most crucial Fifth
2 Amendment right should not be condoned and the Court should recommend suppression of the
3 statements to the District Court.
4

5 DATED this 31st day of December, 2009.
6

7 THE PARIENTE LAW FIRM, P.C.
8

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19 **CERTIFICATE OF SERVICE**

20 I hereby certify that, on this day of December 31, 2009, I electronically filed the
21 Defendant's Reply to the Government's Opposition to Defendant's Amended Motion to
22 Suppress Statements, which caused the document to be served on the attorneys for the U.S.
23 Government.
24

25 /s/ Michael D. Pariente
26 Michael D. Pariente
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA)

Plaintiff,)

vs.)

MAX MILTON,)

Defendant.)

CASE NO.: 2:09-cr-00468-PMP-PAL

ORDER ON DEFENDANT'S AMENDED MOTION TO SUPPRESS STATEMENTS

On this day of _____, 2010, the Court, having considered Defendant's Motion to Suppress Statements is of the opinion that the motion should be GRANTED/DENIED and enters this order accordingly.

DATED this ____ day of _____ 2010.

THE HONORABLE PHILIP M. PRO

UNITED STATES DISTRICT COURT CHIEF JUDGE